Supreme Court, U.S.
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No. 01-1312

IN THE

Supreme Court of the United States

GRAY DAVIS, GOVERNOR OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

DUKE ENERGY TRADING AND MARKETING, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT DUKE ENERGY TRADING AND MARKETING, L.L.C. IN OPPOSITION

BARRY R. OSTRAGER
SETH A. RIBNER
STEVEN H. BREGMAN
SIMPSON THACHER & BARTLETT
10 Universal City Plaza
Suite 1850
Universal City CA 91608
(818) 755-7000

JOEL B. KLEINMAN
JAMES VANR. SPRINGER *
GEOFFREY BESTOR
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037
(202) 785-9700

Counsel for Respondent Duke Energy Trading and Marketing, L.L.C.

* Counsel of Record

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QUESTIONS PRESENTED

The Court of Appeals held that orders of the Governor of California, purporting to override explicit provisions of wholesale electricity tariffs approved by the Federal Energy Regulatory Commission under the Federal Power Act so as to reduce electricity costs during the California electricity crisis which has now passed, should be enjoined on grounds of federal preemption. The petition seeks to raise the following questions:

1. Whether the Court of Appeals correctly applied the rule of *Ex parte Young*, 209 U.S. 123 (1908), in denying the Governor's claim of Eleventh Amendment immunity.

2. Whether the Court of Appeals correctly held that the Governor's attempt to supersede the provisions of the federal tariffs was preempted by the Federal Power Act.

RULE 29.6 STATEMENT

Duke Energy Trading and Marketing, L.L.C. ("DETM") is a limited liability company owned by DETMI Management, Inc. ("DETMI") and Mobil Natural Gas, Inc. ("Mobil Gas"). DETMI, which owns a 60 percent voting and economic interest in DETM, is wholly owned by Duke Energy Corporation, a publicly held corporation. Mobil Gas, which owns a 40 percent voting and economic interest in DETM, is wholly owned by ExxonMobil Corporation, a publicly held corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT	1
A. Background of The Case	3
B. Proceedings Below	5
REASONS FOR DENYING THE PETITION	8
I. THE COURT OF APPEALS' REJECTION OF THE GOVERNOR'S ELEVENTH AMENDMENT DEFENSE IS ENTIRELY CONSISTENT WITH THIS COURT'S COEUR D'ALENE DECISION AND WITH NUMEROUS DECISIONS OF OTHER COURTS OF APPEALS	8
II. THE COURT OF APPEALS WAS PLAINLY CORRECT IN FINDING FEDERAL PREEMPTION	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1485 (2001) 2, 6, 9
ANR Pipeline Co. v. Lafaver, 150 F.3d 1178 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999) ..... *passim*
AT&T Communications v. BellSouth Telecomm. Inc., 238 F.3d 636 (5th Cir. 2001) 10
Cornforth v. University of Oklahoma Bd. of Regents, 263 F.3d 1129 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1172 (2002) 10
Elephant Butte Irrigation Dist. v. Department of the Interior, 160 F.3d 602 (10th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999) 9
Federal Power Comm'n v. Southern California Edison Co., 376 U.S. 205 (1964) 12
First Iowa Hydro-Elec. Co-op v. Federal Power Comm'n, 151 F.2d 20 (1945) 13
Goldberg v. Ellett, *cert. denied*, 122 S. Ct. 1064 (2002) 3
Hamilton v. Myers, 281 F.3d 520 (6th Cir. 2002) .. 10
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) ..... *passim*
J.B. v. Valdez, 186 F.3d 1280 (10th Cir. 1999) 10
Joseph A. v. Ingram, 275 F.3d 1253 (10th Cir. 2002) 10
Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) 12
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953(1986) 12
New York v. Federal Energy Reg. Comm'n, 122 S.Ct. 1012 (2002) 12
Sterling v. Constantin, 287 U.S. 378 (1932) 9

TABLE OF AUTHORITIES—Continued

Page

Summit Med. Assoc. v. Pryor, 180 F.3d 1326 (11th Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000) 10

TFWS, Inc. v. Schaefer, 242 F.3d 198 (4th Cir. 2001) 10

Ex parte Young, 209 U.S. 123 (1908) ..... *passim*

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const:

Supremacy Clause, Art. VI cl. 2 ..... *passim*

Amend. XI ..... *passim*

Federal Power Act, 16 U.S.C. § 792 *et seq.* ..... *passim*

16 U.S.C. § 802 13

16 U.S.C. § 824(a) 12

California Emergency Services Act, Cal. Gov't Code § 8572 4

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT DUKE ENERGY TRADING AND MARKETING, L.L.C. IN OPPOSITION

STATEMENT

Petitioner Davis ("the Governor") asks this Court to review and reverse the Court of Appeals' determinations (1) that the Eleventh Amendment was no bar to an *Ex parte Young* injunction action to prevent the Governor from superseding terms of tariffs exclusively governed by the Federal Power Act, and (2) that the Governor's orders attempting to do so by "commandeering" certain wholesale electricity contracts were preempted under the Supremacy Clause.

Respondent Duke agrees with petitioner that this case did not become moot when the contracts that were the subject matter of the Governor's orders expired by their terms on

December 31, 2001, because there remain issues regarding the effect of the Court of Appeals' invalidation of those orders. But there is no foundation for the petition's claim that the decision below raises cosmic issues of law that are likely to recur. Rather, this case arose out of an unusual confluence of economic and regulatory conditions in the now-past California energy crisis of 2000-2001, and there is nothing in the decision below that would impose any categorical or novel restriction on governors' abilities to "protect their states' residents in crises," Pet. 4. The decision below fits comfortably in the mainstream of *Ex parte Young* and preemption precedents in this Court and the courts of appeals, and there is no genuine conflict with any other decision.

Only a year ago this Court denied a petition by the same California Attorney General asserting the same purported conflict with a Tenth Circuit application of the Eleventh Amendment that he asserts here. *Hardin v. Agua Caliente Band of Cahuilla Indians*, No. 00-1233, *cert. denied*, 121 S. Ct. 1485 (Apr. 2, 2001).[1] Less than three months ago, this Court again denied a petition in which the same California

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[1] The second question presented by that petition was as follows: "*Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), held that the *Ex parte Young* exception to the Eleventh Amendment is not available in core areas of state sovereignty. In conflict with the Ninth Circuit's decision in the present case, a panel of the Tenth Circuit has held that state taxation is a core area of state sovereignty as described in *Coeur d'Alene*. Should this conflict in the circuits be resolved by this Court's determining that state taxation is a core area of state sovereignty that renders the *Ex parte Young* exception unavailable?" That petition claimed conflict with *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999)—the very same decision referred to in the Attorney General's present petition (at 3, 12). As we shall show, the Tenth Circuit has narrowly limited its *ANR* decision, and numerous decisions in that and other circuits are entirely consistent with the decision below in this case.

Attorney General repeated the same claim of conflict. *Goldberg v. Ellett*, No. 01-731, *cert. denied,* 122 S. Ct. 1064 (Feb. 19, 2002).[2] The claim of conflict does not improve with repetition, and it is even less well founded here, where, unlike those three cases, the subject matter has nothing to do with a state's power to tax but merely involves well established principles regarding Federal Power Act preemption of state attempts to regulate.

A. Background Of The Case

The Court of Appeals' opinion amply describes the situation that gave rise to this case, the applicable federal regulatory structure, and the nature of the "block forward market" contracts ("BFM contracts") that the Governor's enjoined orders sought to "commandeer" under California law. Apart from rhetoric, the petition does not disagree with the Court of Appeals' more comprehensive statement in any pertinent respect.

In summary, this case involves the operations of the California Power Exchange ("CalPX"), an independent entity which was established as the principal intermediary for wholesale electricity transactions following California's "restructuring" of its electricity markets beginning in the late 1990s. Such transactions, and the operations of the CalPX itself, were governed by federal tariffs filed with and approved by the Federal Energy Regulatory Commission ("FERC"). Following increases in market prices in the second half of 2000, the principal California retail utilities fell seriously behind in their payments to the CalPX, and

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[2] The *Goldberg* petition stated a compound question including the applicability of *Ex parte Young*, and asserted (at 15-16) that "[t]he Ninth Circuit's holding that the *Coeur d'Alene* exception does not apply . . . also conflicts with the decision of the Tenth Circuit in *ANR Pipeline, Inc. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998)."

accordingly the CalPX was unable to pay Duke and other wholesale providers for electricity which had already been taken by the retail utilities.

In addition to day-to-day auctions conducted by the CalPX, there were also longer-term contractual arrangements between wholesale providers and the retail utilities, which were embodied in BFM contracts. The BFM contracts were also made through the CalPX, and were governed by a FERC-approved tariff, the CalPX Trading Services [CTS] Second Revised Rate Schedule FERC No. 1. In particular, the tariffs provided that all ongoing BFM contracts were to be held as security for all obligations of the retail utilities to the CalPX (and through it to the wholesale providers such as Duke), and that the BFM contracts could be liquidated in the event of any payment default. By early 2001, prevailing auction prices had risen far above the BFM contract prices, giving those contracts substantial market value.

In February 2001, as the CalPX was preparing to liquidate BFM contracts to raise funds to cover the retail utilities' outstanding debts, the Governor promulgated executive orders under the California Emergency Services Act, Cal. Gov't Code § 8572, which purported to "commandeer" the contracts so that the State could purchase electricity under them for resale by the retail utilities. The Governor explained in press releases that "I am using my emergency powers to seize options to buy very inexpensive power . . . . By acting quickly and decisively, we have rescued these contracts from the auction block and preserved their low-cost value for consumers." Pet. App. A8. The effect, of course, was to eliminate the security value of the BFM contracts, which could be realized only by selling those contracts in the marketplace.

Duke sued to enjoin implementation of the Governor's orders on the ground, among others, that any such action in

conflict with the security provisions of the FERC-approved tariffs was preempted by the Federal Power Act under the Supremacy Clause.[3]

B. Proceedings Below

The district court summarily dismissed the complaint on April 30, 2001. Pet. App. 35. The Court of Appeals reversed by a 2-1 vote on September 20, 2001, Pet. App. A1-A34, and denied rehearing and rehearing en banc on December 6, 2001, Pet. App. A39-A40. After rejecting the Governor's contentions about lack of finality and lack of standing (which the petition does not pursue), the majority opinion set forth at considerable length its reasoning on the Eleventh Amendment and preemption issues that the Governor seeks to raise here.

In summary, the majority held that Duke's injunction claim stated a classic cause of action under *Ex parte Young* because it sought prospective relief against a state official based on the Constitution, Pet. App. A16-A18, A24-A25, and did not fall into the narrowly limited category subject to the *Coeur d'Alene* exception for cases seeking "'so much of a

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[3] Duke agreed to provide electricity to the State at the contract prices pending resolution of the litigation. Although the contracts' security value was a wasting asset, a number of the contracts continued in force until December 31, 2001.

Contrary to the suggestion at page 6 of the petition, Duke's position below was not that it should be able to "sell its electricity on the open market . . . at far higher prices" than those provided by the contracts, but rather (as the petition itself states in the next sentence and on the next page) that the CalPX should not be prevented from liquidating the contracts, pursuant to the tariffs, as security for the prior debts owed by the retail utilities. This misstatement is not, however, material to the present issues.

divestiture of the state's sovereignty as to render the suit as one against the state itself,'" Pet. App. A21.[4]

> If Duke were requesting relief that would permanently divest the Governor of his future ability to invoke his emergency powers or remove an entire area over which he could previously use his powers, such as California's intrastate electricity supply, then the narrow holding of *Coeur d'Alene* might well apply. Instead, Duke seeks an injunction against a specific executive order in an area preempted by federal law, which falls squarely under *Ex parte Young*.

Pet. App. A21. The Court contrasted this with the "far reaching and invasive relief" that this Court described in *Coeur d'Alene*, "seek[ing], in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State." Pet. App. A18-A19, quoting 521 U.S. at 282. It concluded that "[t]he relief Duke seeks cannot remotely be analogized to the sweeping relief requested by the Tribe in *Coeur d'Alene* in an area that uniquely implicated state sovereignty concerns." Pet. App. A24.

Given the urgency of the matter and the absence of any dispute as to the relevant facts, the Court of Appeals proceeded to decide the merits of Duke's preemption claim. It noted the well settled principles that the Federal Power Act ("FPA") establishes exclusive federal jurisdiction over wholesale transactions such as those involved in the commandeered BFM contracts, and that any state regulation

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[4] The Court quoted from *Agua Caliente Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000), where, as previously noted, the Attorney General unsuccessfully sought certiorari last Term. The Court further noted the extraordinary pains this Court took to circumscribe its holding in *Coeur d'Alene*. Pet. App. A22 n.8.

of rates or rate-related activities covered by federal tariffs is preempted by operation of the Supremacy Clause. Pet. App. A26-A27.

> Governor Davis' commandeering orders directly nullify the security and default mitigation provisions of the FERC-approved CTS rate schedule, and hence cross the "bright line" between state and federal jurisdiction established by the FPA. By preventing the CalPX from liquidating the [retail utilities'] block forward positions to cover their defaults in the CalPX markets, Governor Davis' commandeering orders effectively rewrote the terms of the CTS rate schedule . . . .

Pet. App. A27-A28. This, the Court held, was "the functional equivalent of . . . an obviously impermissible decree" that "the [retail utilities'] debts to their wholesale suppliers be forgiven." Pet. App. A28. Indeed, the Court noted, FERC had recently rejected a proposed amendment to the CalPX tariff which would have relaxed related security requirements. Pet. App. A28-A29. The effect of the commandeering orders was that "Duke . . . lost its FERC-protected right to standard financial protection. . . . It is Governor Davis' interference with the block forward contracts' security provisions that is preempted by the federal scheme." Pet. App. A31.

Circuit Judge Kozinski filed a brief dissent from the majority's rejection of the Eleventh Amendment defense, but expressed no view on the preemption issue. Stating that he was "almost persuaded—but not quite," Pet. App. A33, Judge Kozinski reasoned no further than the conclusion that in his view it "is hard to imagine" "a more pointed interference with the state's essential sovereign interests" than "second-guess[ing] the actions of the Governor, taken for the purpose of averting what he reasonably believed to be an impending power catastrophe." Pet. App. A34.

REASONS FOR DENYING THE PETITION

The petition acknowledges that "[t]his action arose during extraordinary circumstances." Pet. 11. Those circumstances have passed, and there is no reason to expect a recurrence of the kind of electrical power problems that arose in California two years ago from that State's ill-considered "restructuring" of power markets. Beyond generalities, the petition makes no serious effort to show that any similar situation—involving a gubernatorial attempt to seize intangible property in violation of the provisions of a comprehensive federal regulatory scheme—is likely to recur. Much less is there any likelihood that the circumstances of any such future attempted seizure would resemble the "extraordinary circumstances" from which this case arose.

Moreover, as we shall now show, the Court of Appeals' treatment of both of the questions that the petition seeks to raise was entirely consistent with this Court's settled precedents and with the decisions of other courts of appeals. Accordingly, there is no occasion for further review.

I. THE COURT OF APPEALS' REJECTION OF THE GOVERNOR'S ELEVENTH AMENDMENT DEFENSE IS ENTIRELY CONSISTENT WITH THIS COURT'S *COEUR D'ALENE* DECISION AND WITH NUMEROUS DECISIONS OF OTHER COURTS OF APPEALS.

Contrary to the petition's alarmist assertions, the decision below did not grant the federal courts any excessive "authority to second-guess the emergency actions" of state governors. *See* Pet. App. 11. It held only that *Ex parte Young* did not prohibit enforcement of the Supremacy Clause to enjoin the Governor from taking a specific action that was contrary to federal law. To be sure, the decision did impose some limitation on absolute state sovereignty, but so does any *Ex parte Young* injunction. It has been well established at

least since *Sterling v. Constantin*, 287 U.S. 378 (1932), which enjoined an "attempt to regulate by executive order the lawful use of complainants' properties in the production of oil", *id.* at 402, that the Eleventh Amendment permits a federal court to enjoin a governor's exercise of "police powers" if it is inconsistent with federal law.

Coeur d'Alene explicitly dealt with an "unusual" situation, 521 U.S. at 281, where the exercise of federal judicial authority would categorically "diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory," *id.* at 282, and more generally "would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust," *id.* at 283. Requiring the Governor to respect the exclusive jurisdiction given FERC by federal statute and exercised through FERC's approval of tariffs governing these BFM contracts is plainly not any such unusual divestiture of traditional state authority. There is nothing in *Coeur d'Alene* or any other precedent supporting the extraordinary proposition propounded by the petition—that a governor can override federal law with Eleventh Amendment impunity whenever he or she purports to exercise "emergency powers."

Whether or not the Tenth Circuit's decision in *ANR Pipeline Co. v. Lafaver* was a correct application of the narrow *Coeur d'Alene* exception, the law of the Tenth Circuit is entirely consistent with the decision below.[5] In a series of subsequent cases rejecting Eleventh Amendment defenses, that Court has taken pains to emphasize the limited nature of the exception. *Elephant Butte Irrigation Dist. v. Department of the Interior*, 160 F.3d 602, 612 (10th Cir. 1998), *cert.*

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[5] As previously noted, this Court was unmoved by the Attorney General's claim of conflict in *Hardin v. Agua Caliente Band of Cahuilla Indians*, which did involve the same general subject matter of state taxation as *ANR Pipeline*.

denied, 526 U.S. 1019 (1999) ("extreme and unusual case"); *J.B. v. Valdez*, 186 F.3d 1280, 1286 (10th Cir. 1999) ("narrow limitation"); *Joseph A. v. Ingram*, 275 F.3d 1253, 1260-61 (10th Cir. 2002); *Cornforth v. University of Oklahoma Bd. of Regents*, 263 F.3d 1129, 1134 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1172 (2002). So also here, the Governor's interest in reducing the state's cost of electricity plainly does not implicate any "special sovereignty interest" comparable either to the divestiture of traditional territorial jurisdiction in *Coeur d'Alene* or to the abrogation of state authority to tax property in *ANR Pipeline.*

Petitioner does not even attempt to argue that any decision from any Circuit other than the Tenth is inconsistent with the decision below. In fact, the recent decisions in other Circuits also consistently agree with the Ninth Circuit that the *Coeur d'Alene* exception is a narrow one. *E.g.*, *Hamilton v. Myers*, 281 F.3d 520, 526-28 (6th Cir. 2002) (no bar to injunction to establish constitutionally protected riparian rights); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 204-06 (4th Cir. 2001) (no sufficient "special sovereignty interest" in liquor regulation notwithstanding 21st Amendment); *Summit Med. Assoc. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000) (no bar to injunction against governor and others to prohibit unconstitutional abortion restrictions). In *AT&T Communications v. BellSouth Telecommunications Inc.*, 238 F.3d 636 (5th Cir. 2001), the Fifth Circuit held that the Eleventh Amendment raised no bar to an injunction enforcing preemption of state regulation by the federal Communications Act, stating its agreement with the Sixth, Seventh and Tenth Circuits that a suit to enforce preemption "is a 'straight forward' *Ex parte Young* case." *Id.* at 646 (citations omitted), 648-49.

Here, in contrast to *Coeur d'Alene*, the only detriment to the state was to preclude the Governor from reducing the state's cost of electricity by short-circuiting federal tariff requirements. The judgment did not prevent the Governor

from arranging for the purchase of such power as might be needed to keep the lights on, but merely prohibited his attempt, as he admitted in his contemporaneous press release, to do so "inexpensively." Thus, the judgment did not prevent the state from acting to remedy the emergency that the Governor had declared, but merely prevented it from saving money by destroying the federal rights of the CalPX and its participants to security for the debts owed by the retail utilities. This case is therefore a "straight forward *Ex parte Young* case," and it does not remotely conflict with either *Coeur d'Alene* or *ANR Pipeline*.

II. THE COURT OF APPEALS WAS PLAINLY CORRECT IN FINDING FEDERAL PREEMPTION.

The petition does not dispute the Court of Appeals' determination that the Governor's commandeering orders would "directly nullify the security and default mitigation provisions of the FERC-approved CTS rate schedule" by "preventing the CalPX from liquidating the [retail utilities'] block forward positions to cover their defaults in the CalPX markets," Pet. App. A27. Thus, the petition's challenge on the merits necessarily rests upon the proposition that the tariffs approved by FERC under the Federal Power Act could lawfully be countermanded by the Governor's executive fiat. The petition cites no authority in any court for this proposition, which is at odds with this Court's consistent and explicit recognition and enforcement of FERC's exclusive jurisdiction over such wholesale transactions, spanning more than fifty years of FPA history.

It has long been established that the FPA "draw[s] a bright line easily ascertained, between state and federal jurisdiction, . . . by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by

the States." *Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). "It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring). Thus, the states are categorically forbidden to tamper with or impede enforcement of the provisions of FERC tariffs such as the CalPX tariffs in issue here. *E.g.*, *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

"'[This Court's] decisions have squarely rejected the view . . . that the scope of [FERC] jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest.'" *Id.* at 966 (quoting *Southern California Edison*, 376 U.S. at 215). In view of the FPA's categorical displacement of state jurisdiction, there is no reason to look for any specifically expressed "clear and manifest congressional intent to preempt the state's police power," as the petition suggests (Pet. 17). To the contrary, as *Southern California Edison* explains, there is state power only where it is explicitly granted by the FPA.

The FPA's general exception for "those matters which are . . . subject to regulation by the States," 16 U.S.C. § 824(a), does not grant the Governor any power to override FERC's jurisdiction over wholesale tariffs. It means no more than its language clearly indicates: that the states retain their jurisdiction to regulate *intrastate* facilities. *See New York v. Federal Energy Reg. Comm'n*, 122 S. Ct. 1012, 1024-25 (2002). There is no authority whatsoever for the notion that this exception carves a hole in the federal jurisdiction permitting a state to take whatever action with respect to wholesale transactions it might deem appropriate for the "protection of the health, safety and welfare of the public"

without regard to federal regulation (Pet. 18).[6] Nor is there any significance in the CalPX tariffs' reference to California law as a source of interpretive guidance (Pet. 18-19). The Court of Appeals' determination that the Governor's orders were preempted did not involve any question of tariff interpretation, because the orders incontestably flouted the express provisions of the tariffs as approved by FERC.[7]

CONCLUSION

The decision below dealt with an unusual situation, unlikely to recur, by applying principles of Eleventh Amendment and federal preemption jurisprudence in full conformity with this Court's well established precedents and with the decisions of other lower courts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

BARRY R. OSTRAGER
SETH A. RIBNER
STEVEN H. BREGMAN
SIMPSON THACHER & BARTLETT
10 Universal City Plaza
Suite 1850
Universal City CA 91608
(818) 755-7000

JOEL B. KLEINMAN
JAMES VANR. SPRINGER *
GEOFFREY BESTOR
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037
(202) 785-9700

Counsel for Respondent Duke Energy Trading and Marketing, L.L.C.

* Counsel of Record

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[6] *First Iowa Hydro-Elec. Co-op v. Federal Power Comm'n*, 151 F.2d 20 (D.C. Cir. 1945), referred to an unrelated section of the FPA, 16 U.S.C. § 802, which explicitly requires state approval for hydroelectric projects. The quotation at Pet. 18 is therefore entirely out of context and irrelevant.

[7] Moreover, the Governor did not present his newly conceived argument about the choice of law clause to the Court of Appeals and the Court of Appeals did not address it.